

3. In support of its complaint, KVMD states that in *Time Warner Cable*, the Media Bureau granted a market modification filed on behalf of Time Warner to exclude KVMD from carriage on its cable system serving the cable communities herein.⁴ KVMD states that it filed a reconsideration to seek reversal of this order, but it remains pending before the Commission.⁵ KVMD states that, by certified letters dated September 21, 2005, it demanded must carry status on Time Warner's cable systems within the Los Angeles DMA for the 2006-2008 election period, pursuant to Section 76.61(a)(1) of the Commission's rules.⁶ Time Warner rejected this demand on October 12, 2005.⁷ As a result, KVMD states that it filed this complaint in order to assert and preserve its 2006-2008 must carry rights during the pendency of the above-described reconsideration proceeding. KVMD also requests that, upon reversal of the *Time Warner* decision, the Commission require Time Warner to carry the digital broadcast signal of KVMD-DT.

4. In a Motion to Dismiss, Time Warner argues that KVMD's complaint is frivolous and has no basis in fact or law. Time Warner maintains that KVMD did not establish that Time Warner failed to comply with a *bona fide* request for carriage.⁸ Instead, as shown in Exhibit B to the complaint, Time Warner states that it responded to KVMD's carriage demands by referencing the *Time Warner* market modification decision and indicating that, as a result, KVMD-DT had no must carry rights on the subject cable systems.⁹ Time Warner argues that Section 76.61(a)(3)(i) of the Commission's rules requires that a complainant television station "allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations."¹⁰ Time Warner asserts, therefore, that KVMD is unable to meet the threshold criteria for a valid must carry complaint and its complaint should be dismissed for failure to state a cause of action.¹¹

5. In opposition, KVMD argues that it is aware of the Bureau's decision in *Time Warner* and the fact that the *Order* remains in full-effect during the pendency of the reconsideration proceeding.¹² However, in considering the 2006-2008 must carry landscape in the event the Commission should reverse *Time Warner*, KVMD states that it sought to prevent Time Warner from arguing that KVMD failed to perfect its carriage rights in the new triennial carriage cycle.¹³ KVMD maintains that its only intent in

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available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission's rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. See 47 C.F.R. § 76.55(e).

⁴Complaint at 2, citing 18 FCC Rcd 21384 (2003), *recon. pending*.

⁵*Id.*

⁶*Id.* at Exhibit A; *see also* 47 C.F.R. § 76.61(a)(1).

⁷*Id.* at Exhibit B.

⁸Motion at 1.

⁹*Id.*, citing Exhibit B to the Complaint.

¹⁰*Id.* at 2, citing 47 C.F.R. § 76.61(a)(3)(i).

¹¹*Id.*, citing 47 C.F.R. § 76.6(a)(4).

¹²Opposition at 1.

¹³*Id.* at 2.

filing the instant complaint was to preserve its must carry rights during 2006-2008 election cycle.¹⁴ It is not seeking carriage on Time Warner's systems during the pendency of the reconsideration request.

6. We agree with KVMD and will grant its complaint. Section 76.64(f)(2) of the Commission's rules requires that all television stations make an election between must carry and retransmission consent every three years.¹⁵ KVMD did so in its September 21, 2005 letters to Time Warner and, at the same time, made a demand for carriage pursuant to Section 76.61(a)(1) of the rules.¹⁶ While both parties agree that KVMD does not currently have carriage rights in the subject communities due to the Media Bureau's decision in *Time Warner*, KVMD was within its rights in construing Time Warner's October 12, 2005 response as a denial of carriage and in subsequently filing the instant complaint in order to preserve any future must carry rights. Should the decision in *Time Warner* be reversed during the current election cycle, Time Warner will be subject to the must carry requirements with regard to carriage of KVMD.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition filed by KVMD Licensee Co., LLC **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, to the extent indicated herein.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

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¹⁴*Id.*

¹⁵47 C.F.R. § 76.64(f)(2).

¹⁶47 C.F.R. § 76.61(a)(1).

¹⁷47 C.F.R. § 0.283.